U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-A- LLC

DATE: NOV. 23, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an information technology provider specializing in visual analytics, seeks to employ the Beneficiary as a senior software developer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner asserts that it demonstrated the Beneficiary's qualifying experience.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the DOL-certified job requirements of an offered position. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d. 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of senior software developer as a U.S. master's degree in computer science and two years of experience in the job offered. The Petitioner indicated on the certification that it will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than three years of full-time experience in the United States. He stated that he worked about one year and six months, from January 2012 through June 2013, for a consulting business as a software engineer. He also stated that he worked about one year and eight months, from January 2015 to September 2016, for a consultancy as a software engineer consultant.

Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner submitted letters in support of the Beneficiary's claimed qualifying experience. The Beneficiary himself, however, signed the letter supporting his experience from 2012 to 2013, indicating that he operated his own consulting business during that period. The regulations do not bar self-employment as qualifying experience. But a letter from the Beneficiary supporting his own claimed experience is biased. As noted by the Director, therefore, the letter alone is insufficient to establish his experience. The Petitioner must submit independent, objective evidence - such as government or contemporaneous business records - corroborating the Beneficiary's employment. Absent such evidence, we cannot find that the Beneficiary has the claimed experience from 2012 to 2013.

The record also indicates the Beneficiary's self-employment from January 2015 to September 2016. Copies of his federal income tax return for 2015 identify the employer listed on the labor certification for that period as a business that he owned. The Petitioner submitted copies of paid invoices and three letters from companies stating that the Beneficiary provided services to the firms during that period. Contrary to the information on the labor certification, however, the letters document the Beneficiary's employment of only about a year, from February 2015 to February 2016.

In addition, contrary to the labor certification's specification, the companies' letters do not establish that, from 2015 to 2016, the Beneficiary gained requisite experience "in the job offered."

[1] This petition's priority date is September 11, 2016, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Experience in the job offered means "experience performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 *2 (BALCA Oct. 24, 2011) (citations omitted). Consistent with the listed job duties of the offered position, the letters state the Beneficiary's work with high performance computing, C programming languages, AWS, and cloud computing. But the letters do not specify the Beneficiary's performance of many of the position's duties, or his experience with technologies required by the position. Contrary to the listed job duties of the offered position, the letters do not state that the Beneficiary: built an SQS messaging system; constructed NLP pipelines; modeled data analytics based on Bayesian statistics and probabilities; gained proficiency in Python and HPC; acquired strong knowledge of grid computing, memory management with high dimension modeling technique, statistical analysis, and machine learning; or obtained familiarity with specified databases. The record therefore does not establish the Beneficiary's possession of requisite experience "in the job offered" for any period of time from 2015 to 2016.

On appeal, the Petitioner recites the contents of the letters from the Beneficiary and the companies as evidence of his qualifying experience. But the Petitioner does not submit independent evidence corroborating the Beneficiary's claimed qualifying experience from 2012 to 2013. The Petitioner also does not resolve the omissions in the companies' letters of many of the offered position's duties and required technologies. For the foregoing reasons, the record does not establish the Beneficiary's possession of the requisite two years of experience in the job offered.

III. ABILITY TO PAY THE PROFFERED WAGE

Also, contrary to the Director's decision, the record does not establish the Petitioner's ability to pay the position's proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).[2]

Here, the labor certification states the proffered wage of the offered position of senior software developer as $59,218 to $80,000 a year. As previously noted, the petition's priority date is September 11, 2016. As of the appeal's filing, required evidence of the Petitioner's ability to pay the

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

proffered wage in 2017 was not yet available. We will therefore consider the company's ability to pay only in 2016, the year of the petition's priority date.

The Petitioner submitted copies of a federal income tax return for 2016. The return reflects net current assets of more than $1.4 million, far exceeding the annual proffered wage. The tax return, however, is in the name of the Petitioner's parent company, a corporation separate from the limited liability company (LLC) that filed the petition and its accompanying labor certification. *See* N.C. Gen. Stat. 57D-2-01(a) (stating that a North Carolina LLC "is an entity distinct from its interest owners").

If the tax returns of a parent company include a petitioner's individual finances, the petitioner may rely on the returns to demonstrate its ability to pay a proffered wage. Here, however, the 2016 tax return of the Petitioner's parent does not reflect the Petitioner's individual finances. Rather, the Petitioner submitted copies of bank statements identifying the parent as the owner of nearly all of the $2.1 million in current assets listed on the return. The record does not establish the Petitioner's authorization to use its parent's assets to pay the proffered wage. Moreover, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [immigration officials] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *Sitar Rest. v. Ashcroft*, No. Civ.A02-30197-MAP, 2003 WL 22203713 *2 (D. Mass. Sept. 18, 2003). The record therefore does not establish the Petitioner's ability to pay the proffered wage in 2016.

Also, USCIS records indicate the Petitioner's filing of immigrant petitions for two other beneficiaries.[3] As previously indicated, a petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204,5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of September 11, 2016, or were filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[4] The record lacks the proffered wages and priority dates of the Petitioner's other petitions. The record therefore does not establish its ability to pay the combined proffered wages of this and its other petitions.

As previously indicated, after looking to the regulatory required evidence, we may consider other factors affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15. However, in this case, the 2016 tax return reflects the finances of the Petitioner's parent company, not the Petitioner. Thus, the record lacks required evidence of the Petitioner's ability to

[3] USCIS records identify the two other petitions by the following receipt numbers: SRC 16 903 63582; and SRC 17 902 33514.

[4] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that were denied, withdrawn, or revoked without a pending appeal or motion. It also need not demonstrate its ability to pay the proffered wage of a petition before its priority date.

pay that year. Here, the lack of any form of regulatory required evidence prevents us from analyzing the totality of the Petitioner's circumstances. Absent such required evidence, we cannot find that the Petitioner has the ability to pay.

For the foregoing reasons, the record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. In any future filings in this matter, the Petitioner must submit required evidence of its ability to pay in 2016 and 2017. It must also provide the proffered wages and priority dates of its two other petitions. The Petitioner may also submit additional evidence of its ability to pay during the two-year period, including documentation of its payment of wages to applicable beneficiaries and supporting the factors stated in *Sonegawa*.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of T-A- LLC*, ID# 2000636 (AAO Nov. 23, 2018)